rule should be had.[14] Regarded as a decision based on the non-existence of a real market, the instant case is correctly decided on its facts,[15] but the broad doctrine it lays down does violence to the original purpose of the section. These sales cases arise chiefly when the market has slumped badly; and if we follow the tendency of the language in the instant case to apply § 63 (3) to marketable goods every time the price falls considerably and so becomes unreasonable as compared with the contract price, we are virtually going back almost in entirety to the law as it existed in New York and elsewhere before the Act[16]—and this despite the meticulous reiterations by the courts that the law has been changed by the Act. This re-transition is effected by interpreting the statute in a way different from its intention, as the cases it codified show. Yet the words on their face easily bear the new meaning placed upon them, which is arrived at by slurring over the word "readily" and accentuating "at a reasonable price."[17] The result reached would not be an undesirable one. It is objected that this amounts to specific performance at law of a contract where the remedy is not mutual. What happens is that the seller is permitted at his election to thrust title on the buyer.[18] But this is done at law in the case of a conditional sale, and a similar thing is done in the case of a defrauded seller.[19] Besides, this argument applies to permitting a recovery of the price even for special goods, and the Act has silenced it as to them. And a denial to the seller of the privilege of suing for the price has detrimental consequences as a practical matter. There is thrown on him the burdens incidental to finding a new purchaser and to risking credit again.[20] In addition, an action for goods sold and delivered, being for a liquidated sum, gets preference on the calendar for trial over a contract action for non-acceptance, which frequently is delayed for a long period because of the overcrowded calendars; and speedy settlement is advantageous to the merchant.[21] In view of these practical considerations and the unsatisfactory status of the law in general under § 63 (3), it is likely that the inroad made by the instant case will be welcomed by succeeding cases as a stepping-stone toward a return to the rule of damages as it stood before the Act.

FEDERAL CONTROL OF SENATORIAL PRIMARY ELECTIONS.—In the recent case of *Newberry* v. *United States* (1921) 41 Sup. Ct. 469, the Supreme Court declared

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[14] The English rule, followed in several American jurisdictions before the Act, is commendably easy to apply. The purchase price is recoverable only when the property has passed (other than in the case of payment on a day certain). Otherwise the plaintiff must sue for damages for non-acceptance. *Atkinson* v. *Bell* (1828) 8 B. & C. 277; *Greenleaf* v. *Gallagher* (1900) 93 Me. 549, 45 Atl. 829; *McCormick Harvesting Machine Co.* v. *Balfany* (1899) 78 Minn. 370, 81 N. W. 10; *cf. Tufts* v. *Bennett* (1895) 163 Mass. 398, 40 N. E. 172. The English Sale of Goods Act has no section corresponding to § 63 (3).

[15] The facts do not appear in the report, but information obtained from counsel seems to indicate that there was no market for resale in the real sense.

[16] See cases, *supra,* footnote 3. Of course title passes to the buyer if the seller recovers the price.

[17] A criticism of this is that it plays havoc with the rule of appropriation in § 19. But § 63 (3) does so no matter how interpreted.

[18] § 63 (3) might be regarded as saying this in other words, and then the rule is the same as the English rule and satisfies § 19.

[19] See Williston, *Sales* (1909) § 563, citing also mistake, duress, and infancy in support of this view.

[20] If the buyer argues that there was a market for resale, it is a fair answer that he should have taken the goods instead of repudiating his contract and should thereby have avoided the lawsuit.

[21] See for example Rules of Supreme Court, First Judicial District in New York County, rule VI. An action under § 63 (3), being for goods bargained and sold, approximates an action for goods sold and delivered. *Cf. Braun* v. *Sorscher* (1919) 176 N. Y. Supp. 472. Delays of fifteen months have occurred in New York to-day in contract actions.

unconstitutional the act of Congress, limiting the expenditures which candidates for the United States Senate might legally make in seeking nomination in the state primaries.[1] The act was passed before the enactment of the Seventeenth Amendment.[2] Four members of the court[3] thought this amendment would not make such a statute constitutional. Mr. Justice McKenna, while concurring in the view that the act was unconstitutional because its constitutionality must be tested as of the time it was passed, reserved his opinion on the effect of the Seventeenth Amendment. The remaining four justices[4] though voting for reversal, because of errors in the trial, considered the act constitutional.

By Art. I, Sec. 4 of the Constitution,[5] the source of this Congressional power,[6] Congress is given the power to regulate the election of its members. But the mere fact that the express grant of power refers to "elections," and a primary nomination is not an "election," does not necessarily dispose of the instant case, as the majority seem to assume.

The Constitution deals with all that it takes up in broad outlines. And by Art. I, Sec. 8, cl. 18,[7] power is given to Congress to carry out the powers expressly granted it, by all necessary and proper laws. This is equal to a grant of all appropriate and incidental powers.[8] The regulation of primary elections would seem to be a means clearly adapted to carry out the regulation of the final elections. Hence, such regulation, not being expressly prohibited, would be valid.[9] It was early declared that the powers of Congress are not to be construed strictly;[10] but are to be deemed comprehensive in scope unless expressly limited.[11] The means by which Congress can carry out its express powers are not limited to those means without which the granted powers would fail, but include all means conducive or adapted to the end to be accomplished under the granted power.[12] Without this broad interpretation of such a written document, so as to adapt it to the changing needs of the country, it is a commonplace that our constitution would long since have ceased to be a practical working document.[13] The constitutional intent apparently was to give Congress full control over all the processes of election; and the non-existence of primaries at the time of its adoption, is no reason, under rules of construction long followed by the Supreme Court, for holding Congress powerless to regulate them. It thus appears, that by fair interpretation, the power to regulate elections, when coupled with the "necessary and proper" clause of Art. I, Sec. 8, includes the right to control a primary election,

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[1] (1910) 36 Stat. 822-824, U. S. Comp. Stat. (1916) §§ 188-191; as amended by (1911) 37 Stat. 25-29, U. S. Comp. Stat. (1916) §§ 192-195.

[2] "The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof . . . ."

[3] Mr. Justice McReynolds, Mr. Justice Holmes, Mr. Justice Van Devanter, Mr. Justice Day.

[4] Chief Justice White, Mr. Justice Pitney, Mr. Justice Clark, Mr. Justice Brandeis.

[5] "The Times, Places and Manner of holding Elections for Senators, and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

[6] See *United States* v. *Gradwell* (1917) 243 U. S. 476, 481, 37 Sup. Ct. 407.

[7] "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ."

[8] See *M'Culloch* v. *Maryland* (U. S. 1819) 4 Wheat. 316, 418-421.

[9] *Cf. M'Culloch* v. *Maryland, supra,* footnote 8, p. 421.

[10] See *Gibbons* v. *Ogden* (U. S. 1824) 9 Wheat. 1, 187.

[11] See *Gibbons* v. *Ogden, supra,* footnote 10, p. 196; *South Carolina* v. *United States* (1905) 199 U. S. 437, 448, 26 Sup. Ct. 110.

[12] See *Juilliard* v. *Greeman* (1884) 110 U. S. 421, 440, 4 Sup. Ct. 122.

[13] See *First Nat. Bank* v. *Union Trust Co.* (1917) 244 U. S. 416, 419, 37 Sup. Ct. 734; *cf. Ex parte Yarbrough* (1884) 110 U. S. 651, 658, 4 Sup. Ct. 152.

the only effect of which is to reduce the number for whom the final ballot is to be cast.[14]

The argument of the majority, that if authority to regulate elections be construed to allow regulation of primaries because they are essential to elections, such power could be extended to the regulation of education, and other things, prerequisite to elections, is fallacious. First, the primary is such an integral part of an electoral system, that the "election" can fairly be said to include it, just as it includes the registration of voters. But the test is not whether the primary is necessary for carrying out the election but whether when primaries exist, their regulation is necessary and proper to the control of the manner of the election, or for the exercise of the other legislative powers explicitly vested in Congress. That the regulation of primaries is conducive to carrying out the control of the election, and a proper way, seems clear enough. And it would seem equally necessary. For if there is to be no control of the process which presents men for election, the value of the control over the election itself is largely gone.

That any government should possess the means of its own protection is self-evident,[15] and hitherto, the full control of Congress over all processes which result in the election of its members has been considered necessary.[16] It has been held that the power under Art. I, Sec. 4, extends to the protection of citizens in the exchange of their political views.[17] An act regulating the registration of voters was held valid.[18] Registration being only a means of determining who may vote in the final election, it would seem to be no more integral a component of the "election" than the primaries, which, when adopted, are substantially the means of determining who is to be voted for. If the control of one is necessary for and conducive to the control of elections, so is the control of the other. Indeed, control over primaries is indispensable for this purpose throughout the South, where the same party being always in power, the primary is in actuality the election. In the instant case, the narrow interpretation of the majority seems unfortunate, and contrary in spirit to the liberal view the court has previously adopted in dealing with this question, and in construing other powers of Congress.

Mr. Justice McKenna's reservation of opinion as to the effect of the Seventeenth Amendment deserves consideration as it raises the question of whether repassing the act would make it constitutional. Though he expresses no opinion, since the amendment merely changed the method of election, from election by legislatures to election by the people, there seem to be only two reasons which could have influenced him: (1) That because of the broad electorate, a system of nominations has become more necessary, or (2) that when elections are by the people it becomes more necessary and conducive to their control that Congress control the primaries.[19]

As to the first reason, it has been shown that in determining the validity of a Congressional enactment, it is not the necessity for the institution which is the test, but whether the control of the institution is necessary for and conducive

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[14] *Cf. M'Culloch* v. *Maryland, supra,* footnote 8, pp. 407, 408.

[15] *The Federalist,* LIX.

[16] See *Ex parte Yarbrough, supra,* footnote 13, pp. 657, 658.

[17] *United States* v. *Goldman* (C. C. 1878) Fed. Case No. 15225 (upholding a conviction for conspiracy to prevent a public meeting called to discuss election issues).

[18] (1870) 16 Stat. 145, as amended by (1871) 16 Stat. 433, declared constitutional in *Ex parte Siebold* (1879) 100 U. S. 371.

[19] It would thus also raise the question of whether the control of the nomination of Representatives, their election having always been by popular vote, is not valid. From newspaper reports it would seem that the Attorney General considered that the scope of the decision extended to Representatives. *The New York Tribune,* Nov. 19, 1921.

to the carrying out of a granted power. Yet even were the necessity for the primary the test, though formerly as an abstract proposition not as necessary as now, still if it were the method actually used to select candidates for the final election, it would be just as necessary to that election as when the final choice is to be by the people. As to the second reason, in whatever form the final election take place, it would seem just as necessary and proper that Congress should regulate any process whose purpose is to present candidates, in order effectually to control such election.[20]

If the intimation of the minority is true, that if Congress cannot regulate the primaries by the grant of power under Art. I, Sec. 4, neither can the states, then the decision in the instant case is deplorable. And this minority position seems sound. The right to vote for members of Congress is based on the Constitution,[21] and the states' right to control it is derived from Art. I, Sec. 4.[22] Clearly "election" can mean no more in regard to the states than in regard to Congress. If the States then have any power to regulate primaries, it must be under the Tenth Amendment.[23] By this amendment the states "reserve" the powers they had before the Constitution. The states obviously did not have the power to regulate the nominations for federal officials before the Constitution, for there was no federal government. Moreover since the Constitution and the formation of the federal government were the work of the people and not a compact between the states, the states cannot have this power on the theory that they themselves created the institution and thus, where they have not specifically granted their powers away, may control it in all its functionings. It seems as a result that all control by the states over federal elections must come from Art. I, Sec. 4, and is no part of their "reserved" powers, on the simple reasoning that the states could not reserve a power they never had.[24]

The instant decision, in contrast with previous holdings of the court, leaves the United States not supreme in the exercise of its own proper powers.[25] And as a result, we have the strange anomaly that the federal government must look upon frauds perpetrated for the purpose of sending men to its Congress and not have the power to prohibit or punish them. And if, as seems probable, the states have no power over them, then at present, they are wholly unpunishable.

INSURER'S RIGHT TO RECOVER PAYMENT MADE UNDER MISTAKE OF FACT IN ADJUSTING POLICY-CLAIM.—The recent case of *Fireman's Fund Insurance Co.* v. *Vinton*[1] raises again the interesting question of the right of an insurer to recover a payment made in settlement of a policy-claim when the parties were

[20] Indeed under the system prevailing in many states before the popular election of Senators, it was even more vital that Congress have the power to control the nominating process. Under that system, the selections at the primaries by the people were in effect a mandate to the legislature as to who was to be elected, so that the nominations were in substance the elections themselves. See Merriam, *Primary Elections* (1909) 159.

[21] *Wiley* v. *Sinkler* (1900) 179 U. S. 58, 21 Sup. Ct. 17.

[22] See *Ex parte Siebold, supra,* footnote 18, p. 383; *Hawke* v. *Smith* (1920) 253 U. S. 221, 231, 40 Sup. Ct. 495.

[23] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[24] *Cf.* Powell, *The Child Labor Law* (1918) 3 Southern Law Quart. 175, 176; see *Sturges* v. *Crowninshield* (U. S. 1819) 4 Wheat. 122, 193.

[25] But *cf. M'Culloch* v. *Maryland, supra,* footnote 8, p. 405; *Cohens* v. *Virginia* (U. S. 1821) 6 Wheat. 264, 381, 387; *Pacific Ins. Co.* v. *Soule* (U. S. 1868) 7 Wall. 433, 444.

[1] (N. Y. Sup. Ct., App. T. 1921) 190 N. Y. Supp. 525.